(9)

No. 03-6539

In The

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

PETITIONER'S REPLY BRIEF

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I. THE CORRECT TEST FOR A *PRIMA FACIE* CASE IS WHETHER THE EVIDENCE WOULD PERMIT AN INFERENCE OF DISCRIMINATION, NOT CALIFORNIA'S REQUIREMENT THAT THE OBJECTOR MUST PROVE THAT THE EXISTENCE OF A DISCRIMINATORY MOTIVE WAS "MORE LIKELY THAN NOT"

A. A Merits Test Should Not Be Applied at the *Prima Facie* Stage, Because the Objector Is Barred at That Stage from Obtaining the Most Important Piece of Evidence Which He Needs to Prove His Case on the Merits, Namely, the Challenger's Claimed Reason

The pivotal issue at stake at step one of *Batson* analysis (*Batson v. Kentucky*, 476 U.S. 79 (1986)) is whether the challenger will be required to articulate a non-discriminatory reason for his challenge. That proffered reason – when articulated – almost invariably is critical to any finding of unconstitutional discrimination. However, the state's proposed rule requiring the objector, at step one, to prove the actual existence of discrimination, imposes that burden at a point when the objecting party, unlike a Title VII or other civil plaintiff, does not have access to the key evidence of discrimination, namely, the challenger's proffered reason.

Respondent claims that an objector can prove discrimination more easily at the step one *prima facie* stage, before he hears the prosecutor's reasons, than he can at the step three merits stage, after he hears the prosecutor's reasons. (Respondent's Brief (RB) 26) Respondent claims that the absence of the prosecutor's reasons helps, not hurts, the objector, because, supposedly, the prosecutor's reasons would be damaging to the objector's *prima facie* case. (RB 26) This contention ignores reality.

We surveyed all decisions reported in Westlaw since January 1, 2002, state and federal, which contain a citation to *Batson*, and identified 84 decisions which contain or refer to a finding of invidious discrimination. In the overwhelming majority of these cases, that finding of discrimination turned on analysis of the challenger's stated reason. We set forth in an Appendix a list of those cases.

In 29 cases the court determined that the challenge was discriminatory because the articulated explanation was equally applicable to other jurors of a different race or gender who had not been challenged. In 20 cases the court concluded that discrimination had occurred because the articulated explanation rested on a characterization of the voir dire testimony, actions, or background of the disputed juror which was not supported by the record. In 12 cases the court rejected the peremptory challenge because the proffered reason was not race or gender neutral. In 6 decisions the trial court did not accept the proffered explanation because the cited circumstances or factors had no connection with the issues or parties in the litigation. In 6 cases the prosecutor failed to question the juror about any facts which underlay the articulated reason. In 4 cases, the articulated reason showed bias *in favor of* the challenger. In 11 other cases the court based a finding of discrimination on its conclusion that the proffered explanation was "pretextual."[1] On the other hand, there are only 4 cases where the evidence which the objecting party had in his possession at step one played a substantial role in the ultimate finding of discrimination.

These cases establish that the real purpose of a *prima facie* finding on a *Batson* challenge is to allow the objector to obtain, and the trial court to hear, the challenger's

[1] The number of explanations exceeds the number of cases, because some cases have more than one explanation for the *Batson* violation.

reason. Because this is akin to a discovery motion, it would violate the entire *Batson* process to require an objector to prove discrimination by a preponderance of the evidence at the *prima facie* stage, before obtaining discovery, namely, the prosecutor's claimed reasons. For that would require the objector to try to prove that discrimination was more likely than not before obtaining the evidence he needs to prove that discrimination was more likely than not. Such a cart-before-the-horse procedure would violate due process, just as it would violate due process to require a civil plaintiff to prove his case on the merits without discovery. See, e.g., *Swierkiewicz v. Sorema*, 534 U.S. 506, 511-512, 152 L.Ed.2d 1, 122 S.Ct. 992 (2002).

This Westlaw survey of cases finding discrimination establishes an additional significant set of facts. The number of disputed peremptory challenges in each of these cases, although sufficient (in conjunction with other information) to *permit* an inference of discrimination, is rarely so great as to meet California's "more likely than not" standard.

Number of Disputed Peremptory Challenges	Number of Cases
1	26
2	14
3	12
4	7
5	7
6 or more	15

Of these 84 cases[2] in the last two years where a lower court found discrimination – almost always based on the

[2] The total number of decisions included in this table is smaller than the total number of cases surveyed when *Batson* violations were found, because not every case identifies the number of peremptories.

articulated reason for the challenge – the vast majority would not have met the California *prima facie* case standard as applied here.[3] Had this California standard been in use in the rest of the country, the great proportion of these constitutional violations would have escaped undetected and unredressed, because the objectors would not have been allowed to learn or dispute the challengers' claimed reasons.[4]

Because the success of a *Batson* challenge will rise or fall on hearing the prosecutor's reason, the goals of *Batson* will only be realized by broadly construing the opportunity for the trial court to hear the challenger's reason. That will be achieved by retaining the *prima facie* threshold at the federal "permissive inference" level. However, if the threshold is set at California's unduly high "more likely than not" level, the opportunities to hear the challenger's reason will be minimized, and the goals of *Batson* will be thwarted.

[3] At Petitioner's Brief on the Merits (PBOM) 28-29, Petitioner identified several California cases, in addition to this one, which refused to find a *prima facie* case when the prosecutor challenged all two, or all three, minority jurors. Petitioner adds to that list *Stubbs v. Gomez*, 189 F.3d 1099 (9th Cir. 1999) (California state courts refused to find *prima facie* case even though prosecutor perempted all three black jurors, in case with black defendant; on federal habeas corpus, district court found a *prima facie* case, directed prosecutor to state reasons, and then found those reasons race-neutral.).

[4] There is still another problem when the challenger does not state his reason, namely, that the record is not fully developed for appeal. Without evidence of the challenger's reason, appellate review is made more difficult, because it is much harder to determine whether the trial court acted properly in rejecting a *Batson* motion.

B. California Improperly Applies a Merits Test at the *Prima Facie* Stage

Respondent asserts that establishing a *prima facie Batson* case (a) shifts the burden of persuasion, (b) creates a presumption of discrimination, and (c) thereby entitles the objector to prevail if no rebuttal is presented. (RB 8, 13-16, 42-44) Thus, asserts Respondent, the standard of proof for such a *prima facie* case must be a preponderance of the evidence, because that is the quantum of evidence necessary to establish a presumption, or to prevail on the merits. (*id.*) This argument is incorrect. Respondent effectively ignores the two leading cases from this Court which have ruled in *Batson* cases directly to the contrary. Respondent fails to explain how its proposed test can be harmonized with these two leading cases.

In *Hernandez v. New York*, 500 U.S. 352, 358-359 (plurality opinion), 114 L.Ed.2d 395, 111 S.Ct. 1859 (1991) the Court stated that the three-step *Batson* analysis is to be applied as follows:

> First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.*, at 96-97, 90 L.Ed.2d 69, 106 S.Ct. 1712. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. *Id.*, at 97-98, 90 L.Ed.2d 69, 106 S.Ct. 1712. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.*, at 98, 90 L.Ed.2d 69, 106 S.Ct. 1712. This three-step inquiry delimits our consideration of the arguments raised by petitioner.

In *Purkett v. Elem*, 514 U.S. 765, 767-768, 131 L.Ed.2d 834, 115 S.Ct. 1769 (1995) the Court reaffirmed

that each of these three steps must be evaluated separately, and that merits-level proof is not required until the third step:

> It is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.

In *Hernandez* and in *Purkett v. Elem* this Court effectively explained that a *prima facie Batson* case is established by a permissive inference. This is because a *prima facie* finding under *Batson* merely shifts the burden of producing evidence, does not create a presumption, and does not shift the burden of persuasion. As the Court held in *Purkett v. Elem*, 514 U.S. at 768, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Under this formula, the burden of proof at *Batson*'s *prima facie* stage is merely a permissive inference of discrimination. The objector does not need to "prov[e] purposeful discrimination" – meaning prove discrimination by a preponderance of the evidence – until the third step of *Batson* analysis, after he has heard the prosecutor's reasons. Respondent gives no explanation of why *Hernandez* and *Purkett v. Elem* do not apply here.

Respondent quotes the last sentence of the *Batson* majority opinion out of context, and argues therefrom that a *prima facie* case must be supported by a preponderance of the evidence because, otherwise, a *prima facie* finding, based merely on a permissive inference, could automatically turn into a merits finding, if the prosecutor does not give a reason for his challenge. (RB 16, 25, 32) That last sentence in *Batson* reads: "If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." *Batson v. Kentucky*,

476 U.S. at 100. Respondent is incorrect. A refusal by a prosecutor to provide a reason is simply unimaginable. Thus, the sentence does not mean what Respondent claims it means. Instead, this final sentence in *Batson* simply means that, if the explanation which the prosecutor furnished was not *race-neutral*, then the conviction would be reversed.

California's test, requiring proof of discrimination by a preponderance of the evidence at the *prima facie* stage, should be rejected for two reasons. First, it improperly requires the objector to prove his case on the merits before he has obtained the most important piece of evidence which he would use to prove his case on the merits, namely, the prosecutor's claimed reason. Second, the California test improperly conflates steps one and three of the procedure mandated in *Purkett v. Elem* and *Hernandez* by calling for step three level proof (proof on the merits) at step one (the *prima facie* stage). This is virtually identical to the error committed by the lower court in *Purkett v. Elem*, when it improperly conflated steps one and two of this procedure. Reversal is warranted here, just as in *Purkett v. Elem*.

C. Title VII Standards Do Not Support the Decision of the Court below

The decision of the court below rests on the supposed premises (1) that the standard for a *prima facie* case under *Batson* should be the same as for a *prima facie* case of employment discrimination under Title VII, and (2) that in order to establish a *prima facie* case under Title VII (as well as under *Batson*) the plaintiff must persuade the court to make a finding at the *prima facie* stage that intentional discrimination "more likely than not" actually occurred.

The latter premise totally misstates this Court's *prima facie* test in Title VII cases. By asking this Court to

adopt these premises, the state, without admitting that it is doing so, effectively asks this Court to overturn 30 years worth of law under Title VII, and to impose a fundamental change which would wreak havoc in Title VII law.

In *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the Court held that the four elements of a *prima facie* case under Title VII are:

> (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

These four elements do not include proof of intentional discrimination. Thus, regardless of whether or not a *prima facie* case under Title VII must be proven by a preponderance of the evidence, intentional discrimination does not have to be proven at that stage, by any standard, because it is not an element of the Title VII *prima facie* case. Although intentional discrimination in a Title VII case will be inferred from the finding of a *prima facie* case, the finding of a *prima facie* case comes first, and then the inference of discrimination follows.

Similarly, under Title VII law, creating a *prima facie* case precedes the presumption of discrimination, just as the *prima facie* case precedes the inference that discrimination is more likely than not. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575-577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

Respondent effectively urges this Court to reverse this long established process. Respondent claims that in a Title VII case presentation of proof that discrimination is "more likely than not" must come first, and then the finding of a *prima facie* case comes afterward. This approach totally

reverses Title VII methodology, and puts the cart before the horse.[5] Respondent and the state court are fully mistaken on this point. Yet, they pin their entire position on it.

For more than three decades since *McDonnell Douglas*, the lower federal courts and state courts have universally applied its *prima facie* standard. *McDonnell Douglas* has never been understood to require at the *prima facie* case stage a finding that the existence of discrimination was more likely than not. In literally thousands of applications of *McDonnell Douglas*, including actions under the Age Discrimination in Employment Act, the Americans With Disabilities Act, and section 504 of the Rehabilitation Act, the lower courts have understood that a *prima facie* case could be established by proving the four facts set out in *McDonnell Douglas*, or their equivalent, or by adducing any other evidence sufficient to *permit* an inference of discrimination.

Respondent's assertion that a Title VII *prima facie* case requires a finding of discrimination on the merits is also inconsistent with this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993). Both cases addressed the proper disposition of a case in which the plaintiff had established a *prima*

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[5] The dissent at the California Supreme Court recognized the defect in the majority's reasoning, *People v. Johnson*, 30 Cal.4th at 1336 (Jt. App. 164) (Kennard, J. dissenting):

> To establish a prima facie case in the first stage, a title VII plaintiff is not required to show it is more likely than not that the defendant engaged in illegal discrimination. Instead, the title VII plaintiff is required to prove *facts* from which one can *infer* illegal discrimination.

facie case, and the defendant had proffered an explanation which the trier of fact rejected as untruthful. If, *arguendo*, a *prima facie* case necessarily rested on a (preliminary) finding of intentional discrimination, the proffer of an untruthful explanation would do nothing to undermine that finding, and judgment would have to be entered for the plaintiff. Both *Reeves* and *Hicks*, however, held otherwise.

> The fact finder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination. But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgement for the plaintiff . . . ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

509 U.S. at 511 (emphasis in original). This reasoning would make no sense if, at the *prima facie* case stage, the plaintiff had already been required to prove that intentional discrimination had occurred. See *Reeves*, 530 U.S. at 147.

This Court's employment discrimination decisions have repeatedly insisted that the plaintiff alleging intentional discrimination was entitled to "a full and fair opportunity to demonstrate pretext." *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at 256; see *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, at 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978); *McDonnell Douglas v. Green*, *supra*, 411 U.S. at 804. The *prima facie* standard applied by the California court palpably denies that opportunity to a party advancing a

Batson claim, because, lacking the reason, he cannot establish pretext.[6]

Finally, and surprisingly, the California Supreme Court's interpretation of Title VII law here is not only contrary to this Court's rulings, but is also palpably inconsistent with that court's very own decision in an employment discrimination case only three years earlier. In *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 100 Cal.Rptr.2d 352, 8 P. 3d 1089, that court expressly adopted the standards utilized by this Court in federal employment discrimination cases.

> . . . California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination. . . . (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248 . . . ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. . . .)

24 Cal.4th at 354. The California court in this 2000 opinion then described (and adopted) the federal *prima facie* case standard which requires only evidence that would *permit* an inference of discrimination.

> [T]he plaintiff[ ] . . . must at least show "'actions taken by the employer from which one *can* infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a [prohibited] discriminatory criterion. . . ."'" [citation omitted] . . . quoting *Furnco*

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[6] If this were an employment discrimination case in which the prosecutor had dismissed his black secretary, and in which she had sued under Title VII, the plaintiff would know the claimed reason for her firing, and would be prepared to argue pretext, before she had to prove her case by a preponderance of the evidence. Respondent gives no reason why this procedure should not equally apply under *Batson*, when the prosecutor dismisses, and effectively "fires" a juror.

Construction Corp. v. Waters (1978), 438 U.S. 567, 576.

24 Cal.4th at 355 (emphasis added). That is a far different standard than the decision below, which requires the court to go further at the *prima facie* stage and actually conclude that discrimination occurred.

Guz emphasized that the Title VII *prima facie* case standard was "not onerous," and was "designed to eliminate at the outset the most patently meritless claims." 24 Cal.4th at 354-55. The decision below, on the other hand, insisted that Title VII and *Batson* require at the *prima facie* stage "strong evidence" of discrimination, and proof that discrimination was "more likely than not." The decision below and the state's position are thus contrary to unbroken lines of authority both from this Court and from that very same state court.

D. Respondent's Remaining Arguments Are Without Merit

(1) The state claims that Petitioner's proposed test calls for a *prima facie* case to be found whenever there is a "barely logical inference," or an "improbable but barely logical" inference, of discrimination, regardless of how weak or strong the inference is. (RB 24, 29, 38, 45) This misdescribes Petitioner's position, which is that a *prima facie* case exists if the evidence on the record would allow a reasonable judge to infer that challenges were based on group bias. If the inference were no more than "barely logical," a reasonable judge would be unlikely to infer a *prima facie* case.[7]

[7] For example, every time the prosecutor challenges a black juror, there might be, as Respondent asserts, a "barely logical inference" of discrimination. (See RB 35-36) However, under the federal cases which interpret *Batson*, and under Petitioner's proposed test, that modicum of

(Continued on following page)

(2) The state claims that "Petitioner can prevail only if California's standard is constitutionally prohibited," and that it is not, because this Court has not directed the states how to "implement" the *Batson prima facie* test. (RB 23-24) The state argues therefrom that, under federalism, it may use any old *prima facie* test it wishes. (RB 23-24) It effectively argues that this Court should allow a double standard to exist, with one standard based on *Batson* and the equal protection clause, and with the other standard based on California procedure. Such dual approach is not allowed.

First, *Hernandez v. New York* and *Purkett v. Elem* establish the three-step process for evaluating a *Batson* claim. These are cases which the Court reviewed for constitutional error, under the 14th Amendment's Equal Protection Clause. Under the Supremacy Clause, those procedures are binding on the states, including California.[8]

Second, the California Supreme Court did not itself take such an approach. It did not intend to create a unique California test. Instead, that court held that its prior standard of "'strong likelihood' has never set a higher standard than *Batson* permits," *People v. Johnson*, 30 Cal.4th at 1317 (Jt. App. 132), and that "the California standard is not less generous than the test the *Batson*

evidence would not be sufficient, by itself, to allow a permissive inference of a *Batson* violation to be found without more information. Such additional information could include, for example, the race of the defendant, or whether the case contained racial issues, or the racial makeup of the venire. For, the strength of the inference would be quite different if one black juror is challenged when many black jurors remain in the box, or in the venire, as opposed to when only one or two blacks are in the room.

[8] Of course, states are free, under their own statutes or constitutions, to protect constitutional rights to an even greater extent than they are protected under the U.S. Constitution. (See, e.g., RB 34, n.10.)

court itself applies to establish a *prima facie* case." *People v. Johnson*, 30 Cal.4th at 1319 (Jt. App. 128).[9]

(3) Respondent claims that "requiring a statement of reasons from the striking party invalidates the peremptory challenge statute, which in California provides that 'no reason need be given for a peremptory challenge.' Cal. Civ. Proc. Code §226(b)." (RB 19, 27) Respondent argues from this premise that a *prima facie* case must be proven by a preponderance of the evidence, because it should take at least that quantum of evidence before a statute may be declared "unconstitutional as applied." (*id.*) Both of Respondent's premises are incorrect.

(a) Respondent relies on §226(b) of the California Code of Civil Procedure (CCP), which states: "A challenge to an individual juror may be taken orally or may be made in writing, but no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily." Respondent contends that the phrase "no reason need be given for a peremptory challenge" categorically bars disclosure of the purpose of a peremptory challenge. Respondent is mistaken.

The portion of CCP §226(b) on which Respondent relies appears to be no more than a definition of a peremptory challenge, framed to distinguish such a challenge from a challenge for cause. Section 226(b) establishes the method for challenging (peremptorily or for cause) an individual juror; the "no reason need be given" clause merely explains that in the case of a peremptory challenge, unlike a challenge for cause, there is no "need" for a justification.

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[9] Indeed, elsewhere in its brief, Respondent admits, contrary to its position on this point, that the California court held that "the different phrasings by this Court and the California Supreme Court . . . did not establish different burdens . . . " (RB 9)

(b) The interpretation of CCP §226(b) proposed by Respondent cannot be accurate, because it would be wholly inconsistent with §231.5 of the California Code of Civil Procedure, which codifies *Batson*-type challenges, and which provides: "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar ground." Enforcement of CCP §231.5 would be seriously impaired if §226(b) were construed to create a privilege from disclosing whether a party had acted for the purpose of violating CCP §231.5.

(c) In any event, §226(b), regardless of its meaning, cannot operate to alter for California litigants the *prima facie* case standard established by *Batson*. If California could impose a heightened standard for establishing a *prima facie* case, the necessary result would be that constitutional claims that would be sustained and redressed under the usual *Batson* standard in other states would in California be rejected for lack of a *prima facie* case. If CCP §226(b) had that effect, it would obstruct enforcement of *Batson* and would be preempted by federal law. *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 138, 108 S.Ct. 2302 (1988).

(4) Although Respondent does not deny that, as a matter of practice in the federal courts, a *prima facie Batson* case will generally be found whenever a prosecutor challenges two or more jurors from the defendant's racial group, and thereby eliminates more than half of the jurors from that group. Respondent tries to undercut this general rule by claiming there are exceptions. However, Respondent cites only two cases which it claims are exceptions (RB 40), but neither is. In *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002), a *prima facie* case was found where the prosecutor struck four of seven Hispanics and both blacks. In *Simmons v. Luebbers*, 299 F.3d 929, 941 (8th Cir. 2002) a *prima facie* case was found as to one

juror. Respondent has thus found no exception to this general rule.

(5) Finally, Respondent claims that *Batson* inquiries should be disfavored, because supposedly they "delay" or "disrupt" the jury selection process. (RB 34-35) Respondent is mistaken. In the instant case, the denial of two *Batson* motions regarding three jurors took no more than seven transcript pages. (Jt. App. 4-10) Ruling on the merits of those motions would have taken only a few minutes more. Trial court litigation of *Batson* claims is invariably brief, occupying only a small portion of the voir dire process.[10] It is better to spend a few extra minutes to learn the prosecutor's reasons to ensure that discrimination does not occur, than to take five years, and thousands of hours of litigation, as has occurred here, when such an initial inquiry is not made. The old adage about "an ounce of prevention" comes to mind.[11]

[10] See, e.g., *Berry v. State*, 2004 WL 351050 at *8 (Md. App.); *Dorsey v. State*, 2003 WL 22964719 (Fla. Sup. Ct.); *Lancaster v. Adams*, 324 F.3d 423 (7th Cir. 2003); *Paschal v. Flagstar Bank*, 295 F.3d 565, 574 (6th Cir. 2002); *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Harris*, 820 So. 2d 471 (La. 2002); *State v. Marlowe*, 89 S.W. 2d 464 (Mo. 2002).

[11] Only one amicus curiae brief was submitted in support of Respondent, by the Criminal Justice Foundation (CJF) of Sacramento, California. Notably absent is any brief of amicus curiae from any other state. This confirms that California stands alone (i) in asserting that a preponderance of the evidence is needed to establish a *prima facie Batson* case, and (ii) in prohibiting comparative juror analysis.

Further, the position of this one amicus is so at odds with the principles which underlie *Batson* that it should be disregarded. For example, (a) this amicus is largely unconcerned by racial discrimination in jury selection, because it believes that "a jury tainted by racially motivated peremptory challenges can still be impartial." (CJF brief, p. 12) (b) This amicus believes that it is more important to insulate a prosecutor from potentially being "embarrass[ed]" by having his racial motives questioned, than it is to preserve the equal protection rights of

(Continued on following page)

II. THE LOWER COURTS' RELIANCE UPON CONJECTURAL JUSTIFICATIONS AT THE *PRIMA FACIE* STAGE VIOLATES THE RULE THAT A *PRIMA FACIE* CASE IS TO BE EVALUATED WITH THE CHALLENGES "UNEXPLAINED"

The Question Presented is: "Whether to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?"

This standard is partially correct insofar as it insists that the sufficiency of a *prima facie* case should be resolved "unexplained," meaning without regard to any explanations, whether actual or postulated, of the disputed challenges. (Petitioner contends, of course, this standard is incorrect insofar as it requires proof that a peremptory challenge was "more likely than not" motivated by a discriminatory purpose.)

In determining if Petitioner established a *prima facie* case, the courts below attached great – indeed, dispositive – significance to whether they could identify a possible legitimate explanation for the disputed challenges. The trial judge found there was no *prima facie* case because that judge believed that particular statements by the jurors "would have justified a peremptory challenge." (Jt. App. 8) The state supreme court held that affirmance was required, whenever "the record suggests grounds on which

the jurors and the litigants to be free from racial discrimination in jury selection. (CJF brief, pp. 6, 24-26) (c) This amicus opposes asking a prosecutor to state reasons, because that supposedly limits his ability to challenge based on a "hunch." (CJF brief, pp. 6, 20, 23-24) However, this amicus fails to explain why, if such a "hunch" were race-neutral, the prosecutor could not state a valid reason in support of that "hunch," especially after having read the juror's questionnaire and heard the juror's answers on voir dire.

the prosecutor might reasonably have challenged the jurors." *People v. Johnson*, 30 Cal.4th at 1325. (Jt. App. 146)

The state defends that reasoning on the theory that at the *prima facie* case stage a trial judge may decline to be "persuaded by a showing offset by other information before them." (RB 3, n.2) In so arguing, the state implicitly attacks the portion of the Question Presented which provides that, at the *prima facie* stage, challenges are to be assessed "unexplained." The state's argument, relying upon supposed reasons, is poorly taken because it confuses step one and step three of the *Batson* analysis. Under *Batson*, the point at which the court decides if the objector's evidence is "offset by other information" is step three. In determining at step one whether the objector has established a *prima facie* case, the question is a decidedly narrower one – whether the objector has identified sufficient evidence to require disclosure of the claimed reason for the challenge.

At step one of *Batson* analysis, the *prima facie* stage, if the challenger states his reasons, the question of whether there is a *prima facie* case becomes moot, and the court proceeds to determine whether the asserted reason is race-neutral (step two), and whether the reason is valid and credible (step three). *Hernandez v. New York*, *supra*, 500 U.S. at 359 (plurality opinion), citing *United States Postal Service Board v. Aikins*, 460 U.S. 711, 715, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983) (a Title VII case); *Stubbs v. Gomez*, *supra*, 189 F.3d at 1104; *People v. Sims* (1993) 5 Cal.4th 405, 428 [20 Cal.Rptr.2d 537, 853 P.2d 992]. Because stated reasons have no place at the *prima facie* stage, and actually move a case beyond the *prima facie* stage, postulated or speculative reasons are similarly inapplicable there, (a) because they are merely a proxy for stated reasons, and (b) because they are a legally insufficient proxy.

At step one the court considers the sufficiency of the objector's showing "if unexplained," because the very purpose of determining if there is a *prima facie* case is to decide whether to require the challenger to proffer an explanation. It makes no sense, and is contrary to *Hernandez v. New York*, for a court to find no *prima facie* case, and excuse the challenger from giving a reason, merely because the court anticipates that he might be able to articulate a race-neutral explanation.

It makes even less sense, and is similarly contrary to *Hernandez*, to reject a *prima facie* case because the court itself is able to articulate an explanation of its own for the disputed peremptory. It is irrelevant whether the trial judge, if he or she had been counsel for a party, might have used a peremptory challenge against a juror. It is equally irrelevant whether the exercise of that peremptory challenge can be "explained" on paper, in the sense that the record provides a rational basis for objecting to the juror in question. If the exercise of that challenge was in fact motivated by impermissible motives, that challenge violated the constitution regardless of whether the state's actions, on paper, would satisfy a rational basis test.[12]

The state suggests that this error by the lower courts is outside the scope of the Question Presented. (RB 46 n.12) But the Question framed by the Court expressly proposes that proof of a *prima facie* case be based on the probativeness of the evidence "if unexplained." The Question Presented is not, as the state suggests, limited to the degree of persuasiveness of the objector's evidence; it also

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[12] *Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) ("[S]peculation does not aid our inquiry into the reasons the prosecutor actually harbored for the [disputed] strike. *Batson* is concerned with uncovering purposeful discrimination, . . . our review is focused solely upon the reasons given."

encompasses the question about whether or not a particular type of evidence – proposed explanations – should be considered at step one. We contend that the exclusion of explanations is a correct one, and that it should preclude at step one any consideration of possible explanations hypothesized by the court or appellate counsel.

III. A *PRIMA FACIE* CASE OF A *BATSON* VIOLATION IS SHOWN ON THIS RECORD

Respondent does not deny that a *prima facie* case would be found here if the standard proposed by Petitioner were employed. Respondent does not deny that the statistical odds were 1:87 here that the prosecutor would challenge all three black jurors (or any other three specific jurors). Respondent does not explain why these facts do not establish a *prima facie* case. (See PBOM 47-48)

CONCLUSION

Petitioner respectfully requests that this Court reverse the court below and rule that a *prima facie* case is presented here.

Respectfully submitted,

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APPENDIX

STATE AND FEDERAL DECISIONS FINDING *BATSON* VIOLATIONS JANUARY 1, 2002 TO MARCH 1, 2004

Berry v. State, 2004 WL 351050 at *8 (Md. App.) (unknown number of disputed peremptory challenges; one peremptory found to violate *Batson*; *Batson* violation found because the proffered explanation was "discredited").

Besser v. Walsh, 2003 WL 22093477 at *26-*30 (S.D.N.Y.) (seven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Bounds v. Taylor, 77 Fed. Appx. 99, 106-07, 2003 WL 22325312 (3d Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record, and because the explanation was not "plausible").

Brown v. State, 256 Ga. App. 209, 568 S.E. 2d 62, 63 (Ga. App. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

Bui v. Haley, 321 F. 3d 1304 (11th Cir. 2003) (eleven disputed peremptory challenges; *Batson* claim upheld because attorney who proffered explanations for the disputed challenges lacked personal knowledge of the reasons for which a different attorney had exercised those challenges).

Commonwealth v. Maldonado, 439 Mass. 460, 788 N.E. 2d 968 (2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Collins v. Rice, 348 F. 3d 1082 (9th Cir. 2003) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral, because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Davey v. Lockheed Martin Corp., 301 F. 3d 1204 (10th Cir. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Davis v. State, 818 So. 2d 1260, 1262-65 (Miss. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Dorsey v. State, 2003 WL 22964719 (Fla. Sup. Ct.) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Duran v. State, 2002 WL 15859 (Tex. App. 14th Dist.) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the proffered explanation was not related to the parties or issue in the case).

Fleming v. State, 825 So. 2d 1027 (Fla. App. 1st Dist. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because challenger had challenged all three black prospective jurors).

Gaines v. State, 258 Ga. App. 902, 575 S.E. 2d 704 (2003) (at least four disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Gay v. State, 258 Ga. App. 634, 574 S.E. 2d 861 (2002) (thirteen disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Gibson v. State, 117 S.W. 2d 567 (Tex. Ct. App. 2003) (four disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the circumstances relied on in the explanation actually favored the party that had challenged the juror).

Harrison v. State, 2003 WL 1949812 (Ala. Crim. App.) (two disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Holloway v. Horn, 355 F. 3d 707 (3d Cir. 2004) (eleven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Jackson v. State, 832 So. 2d 579 (Miss. App. 2002) (eleven disputed peremptory challenges; attorney's statement that he wanted to "get down the line to some other jurors" did not constitute a race neutral reason).

Lancaster v. Adams, 324 F. 3d 423 (7th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

Lansdale v. Hi-Health Supermart Corp., 54 Fed. Appx. 268, 2002 WL 31856113 (9th Cir. 2002) (three disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Lenoir v. State, 830 So. 2d 703 (Miss. App. 2002) (eight disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged jurors that was not supported by the record).

Lewis v. Lewis, 321 F. 3d 824 (9th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

McCormick v. State, 2004 WL 350987 (Ind.) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

Mills v. State, 813 So. 2d 688 (Miss. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

Montgomery v. State, 811 So. 2d 417 (Miss. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record and because the proffered explanation was not race neutral).

Murphy v. State, 2003 WL 22989233 (Miss. App.) (two disputed peremptory challenges; statement that attorney "just had a bad feeling about" disputed juror did not constitute a race neutral reason).

Paschal v. Flagstar Bank, 295 F. 3d 565, 574 (6th Cir. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

People v. Allen, 9 Cal. Rptr. 374 (Cal. App. 1st Dist. 2004) (two disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Alston, 307 A.D. 2d 1046, 763 N.Y.S. 2d 764 (App. Div. 2d Dept. 2003) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

People v. Armstrong, 2003 WL 22299824 (Mich. App. 2003) ("several" (apparently two) disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not race neutral ("I'm not going to excuse anything other than white people. That's just my policy.")).

People v. Battle, 308 A.D. 2d 597, 765 N.Y.S. 2d 251 (App. Div. 2d Dept. 2003) (two disputed peremptory challenges; prosecutor's explanation insufficient because it "amounted to little more than a denial of discriminatory purpose.").

People v. Burroughs, 744 N.Y.S. 2d 608 (App. Div. 4th Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

People v. Campos, 290 A.D. 2d 456, 738 N.Y.S. 2d 108 (App.Div. 2d Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

People v. Chapman, 295 A.D. 2d 359, 744 N.Y.S. 2d 42 (App. Div. 2d Dept. 2002) (four disputed peremptory challenges (finding of *prima facie* case was based on the first three); *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Chin, 771 N.Y.S. 2d 158 (App. Div. 2d Dept. 2004) (three disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

People v. Coleman, 292 A.D. 2d 461, 738 N.Y.S. 2d 877 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because explanation was "pretextual").

People v. Davis, 308 A.D. 2d 343, 674 N.Y.S. 2d 184 (App. Div. 1st Dept. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the proffered explanation was not race neutral).

People v. Duarte, 300 A.D. 2d 159, 751 N.Y.S. 2d 734 (App. Div. 1st Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race or gender).

People v. Haggard, 332 Ill. App. 3d 46, 772 N.E. 2d 829 (Ill. App. 1st Dist. 2002) (five disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Henry, 309 A.D. 2d 717, 766 N.Y.S. 2d 551 (App. Div. 1st Dept.) (one disputed peremptory challenge; statement in question by juror actually favored the party exercising the peremptory challenge against the juror).

People v. Jenkins, 302 A.D. 2d 247, 756 N.Y.S. 2d 151 (App. Div. 1st Dept. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Johnson, 196 Misc. 2d 417, 765 N.Y.S. 2d 199 (Sup. Ct. 2003) (three disputed peremptory challenges by defendant; six disputed peremptory challenges by prosecutor; *Batson* challenges for both sides upheld on ground that the explanations were "pretextual.")

People v. Jones, 297 A.D. 2d 256, 746 N.Y.S. 2d 596 (App. Div. 1st Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Lawson, 300 A.D. 319, 750 N.Y.S. 2d 777 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was either not racially neutral or was pretextual.)

People v. Leaym, 2003 WL 21079821 (Mich. App.) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Lozado, 303 A.D. 2d 270, 755 N.Y.S. 2d 611 (App. Div. 1st Dept. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Miller, 298 A.D. 2d 194, 748 N.Y.S. 2d 50 (App. Div. 1st Dept. 2002) (unknown number of disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Muhammad, 108 Cal. App. 4th 313, 133 Cal. Rptr. 308 (Cal. App. 2d Dist. 2003) (at least six disputed peremptory challenges; *Batson* claim upheld because the trial court found the proffered reasons were pretextual because they were "intended to disguise the actual reason for peremptory challenges: group bias.")

People v. Pacheco, 308 A.D. 2d 403, 764 N.Y.S. 2d 426 (App. Div. 1st Dept. 2003) (unknown number of disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

People v. Ramirez, 751 N.Y.S. 2d 248, 298 A.D. 413 (App. Div. 2d Dept. 2002) (one disputed peremptory challenge; defense counsel had used 11 of his 15 peremptory challenges against white jurors; *Batson* claim upheld because explanation was "pretextual").

People v. Sanford, 297 A.D. 2d 759, 747 N.Y.S. 2d 789 (App. Div. 2d Dept. 2002) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

People v. Silva, 25 Cal. 4th 345, 106 Cal. Rptr. 93, 21 P. 3d 769 (2001) (at least five disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

People v. Van Hoesen, 307 A.D. 2d 376, 761 N.Y.S.2d 404 (App. Div. 3d Dept. 2003) (four disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not race-neutral).

People v. Wesley, 2002 WL 1065567 (Cal. App. 2 Dist.) (five disputed peremptory challenges; *Batson* claim upheld because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation, because one explanation concerned a statement by the juror that favored the challenging party, and because of racial pattern of challenges).

People v. Willis, 27 Cal. 4th 811, 43 P. 3d 130, 118 Cal. Rptr. 301 (2002) (fifteen disputed peremptory challenges; *Batson* claim upheld in part because challenger appeared to have engaged in "systematic" exclusion of whites).

Pryor v. Commonwealth, 2003 WL 21241881 (Ky. App.) (three disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

Rodriguez v. Schriver, 2003 WL 22671461 (S.D.N.Y. 2003) (three disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not national origin neutral and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

Shelton v. State, 257 Ga. App. 890, 572 S.E.2d 401 (Ga. App. 2002) (three disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the proffered explanation was not related to the parties or issue in the case).

Silas v. State, 847 So. 2d 899 (Miss. App. 2002) (five disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State ex rel. Ballard v. Painter, 213 W.Va. 290, 582 S.E. 2d 737 (2003) (one disputed peremptory challenge; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Chatwin, 58 P. 3d 867, 2002 UT App. 363 (Utah App. 2002) (one disputed peremptory challenge; *Batson* claim upheld because explanation for challenge to sole minority juror was not gender neutral.)

State v. Dunn, 831 So. 2d 862 (La. 2002) (eight disputed peremptory challenges; *Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Harris, 820 So. 2d 471 (La. 2002) (two disputed peremptory challenges) (*Batson* claim upheld because the proffered explanation was not race neutral, because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation, and because the explanation was based on a fact about the challenged juror that actually favored the party utilizing the challenge).

State v. Heckenlively, 83 S.W. 3d 560 (Mo. App. 2002) (five disputed peremptory challenges) (*Batson* claim upheld because the explanation was based on a characterization of the challenged juror that was not supported by the record and because of pattern of juror strikes).

State v. Jensen, 76 P. 3d 188 (Utah 2003) (two disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

State v. Lewis, 354 S.C. 222, 580 S.E. 2d 149 (S.C.App. 2003) (unknown number of disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not gender neutral).

State v. Marlowe, 89 S.W. 2d 464 (Mo. 2002) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the proffered explanation was not related to the parties or issue in the case).

State v. Shepherd, 839 So. 2d 1103 (La. App. 3 Cir. 2003) (five disputed peremptory challenges; *Batson* claim upheld because the proffered explanation was not related to the parties or issue in the case).

State v. Stewart, 2004 WL 135317 (La. App. 5 Cir.) (two disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race and because the explanation was based on a characterization of the challenged juror that was not supported by the record).

State v. Wade, 832 So. 2d 977 (La. App. 2 Cir. 2002) (seven disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State v. Walker, 2002 WL 834179 (Ohio App. 1 Dist.) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

State v. White, 859 So. 2d 751 (La.App. 2 Cir. 2003) (six disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

United States v. Ajayi, 67 Fed. Appx. 63, 2003 WL 21369262 (2d Cir.) (two disputed peremptory challenges; *Batson* claim upheld because trial court concluded that the proffered explanations were not "credible reasons.")

United States v. Alanis, 335 F. 3d 965 (9th Cir. 2003) (six disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different gender).

United States v. Bennett, 74 Fed. Appx. 201, 2003 WL 22048029 (3d Cir.) (nine disputed peremptory challenges; *Batson* claim upheld because trial judge rejected explanation as "farcical").

United States v. Chinnery, 68 Fed. Appx. 360, 2003 WL 21469342 (3d Cir.) (four disputed peremptory challenges; *Batson* claim upheld because challenger was unable to articulate race-neutral reason for two disputed challenges).

United States v. Wellington, 82 Fed. Appx. 828, 2003 WL 22952603 (4th Cir.) (four disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").

U.S. Xpress Enterprises, Inc. v. J.B.Hunt Transport, Inc., 320 F. 3d 809 (8th Cir. 2003) (one disputed peremptory challenge; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Walters v. Mitchell, 2002 WL 1751400 (E.D.N.Y.) (four disputed plaintiff peremptory challenges; five disputed defense peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race, and because the challenging party had failed to question the challenged juror about the problem of possible bias stated in the proffered explanation).

Warwick v. Kuhlmann, 2003 WL 22047883 (S.D.N.Y.) (unknown number of disputed peremptory challenges; reason for sustaining *Batson* claim not stated).

Webb v. State, 2003 WL 22006006 (Miss. App.) (one disputed peremptory challenge; reason for sustaining *Batson* claim not stated).

Weddell v. Weber, 290 F.Supp. 2d 1011 (D.S.D. 2003) (one disputed peremptory challenge; prosecutor's statement that he just had a "gut feeling" that he did not want the juror was insufficient to satisfy the prosecution's burden at stage two).

White v. State, 257 Ga. App. 723, 572 S.E. 2d 70 (Ga. App. 2002) (twelve disputed peremptory challenges; *Batson* claim upheld because the criterion for the challenge articulated in the explanation had not been applied equally to comparable jurors of different race).

Wilson v. State, 798 A. 2d 1042 (Del. 2002) (two disputed peremptory challenges; *Batson* claim upheld because explanation was "pretextual").